Region 10 Briefing Paper for the Office of the Regional Administrator

MEETING/EVENT TITLE:
"*Deschutes TMDL Notice of Intent from Northwest Environmental Advocates – How to Respond*"
MEETING DATE: 11/7/2017 10:00 am – 10:45 am
LOCATION: Dan's Office
CONFERENCE CALL LINE: (b) (6)
PREPARED BY: Chris Zell and Leah Brown
DATE: 11/7/2017
INVITED EPA ATTENDEES: Region 10: Dan Opalski; Dave Croxton; Leah Brown; Jennifer Byrne; Laurie Mann; Cara Steiner-Riley; Chris Zell. Headquarters: Jim Havard; Holly Arrigoni; Jim Curtin; Chris Lewicki.

I. REQUESTING OFFICE

Office of Water and Watersheds / Watershed Unit

II. TIMING

On August 23, 2017, NWEA provided a Notice of Intent (NOI) to sue EPA under the Clean Water Act (CWA) for failure to perform the mandatory duty of approving or disapproving the Deschutes River TMDL within the statutorily mandated 30-day timeframe. NWEA may initiate litigation at any time. NWEA indicated in conversations with EPA and Ecology on October 13, 2017, that it intends to file suit soon.

III. PURPOSE

- Summarize the Deschutes River TMDL and administrative history
- Share outcomes from informal conversations with Ecology and NWEA following receipt of the NOI
- (b) (5)
- Meeting outcomes include Regional agreement on recommended path forward and identification of additional briefings to confirm recommendation with Headquarters

IV. BACKGROUND/HISTORY

The Deschutes River, Percival Creek, and Budd Inlet Tributaries (Phase 1) TMDL study area (186 mi^2) is located in south Puget Sound and is situated within the boundaries of Thurston and Lewis Counties, Washington. The study area includes the major cities or towns of Olympia, Lacey, Tumwater, and Rainier. During early stages of TMDL

development (~2005-2014), Ecology initially planned to submit a TMDL addressing impairments in both freshwater (Deschutes) and marine (Budd Inlet) water quality limited segments. (b) (5)

Ecology decided to split the TMDL into freshwater and marine segments. Ecology submitted the freshwater (Phase 1) Deschutes TMDL to EPA for approval on December 17, 2015. (b) (5)

The 2015 TMDL submittal included a request for EPA to approve allocations for 73 Water Quality Limited Segments (WQLSs) impaired by five pollutants (temperature, dissolved oxygen [DO], pH, fecal coliform [bacteria], and fine sediment). Beginning in February 2016, EPA and Ecology have discussed opportunities to remedy legal and technical shortcomings of the TMDL that have been identified by both EPA (WU, ORC) and potential plaintiffs (NWEA, Squaxin Island Tribe). (b) (5)

Ecology chose to send another submittal letter concerning the Deschutes TMDL on July 17, 2017, asking EPA "to focus" on a subset of TMDLs for bacteria, temperature, and fine sediment (n = 46). The 2017 letter states that Ecology will revisit the Deschutes River TMDL for necessary parameters in 2030 if actions included in its implementation plan (e.g., development of full mature riparian vegetation) are not met by then. In addition, the 2017 letter included two augmentations to the bacteria and water temperature TMDLs intended to remedy some acknowledged deficiencies in the original submission. These augmentations include: (1) an equation to calculate a numeric daily loading value for temperature (allowable stormwater discharge); and (2) including a table expressing bacteria allocation in daily units. (b) (5) ACP

Deschutes (WA) TMDL Key Dates

(b)(5)

Dates	Event
2004	Sampling Plan Completed
2003 - 2007	Monitoring
2007 - 2014	TMDL Development
April 2014	Announcement to Submit Freshwater Components Only
December 2015	Ecology Submitted TMDL to EPA
February - October 2016	EPA Concerns Shared with Ecology
June 2016	Ecology Hosted Squaxin Island Tribe – Tribal Coordination Meeting
August 2016	EPA/Ecology Discussion with NWEA in Portland, OR
(b) (5)	
January 2017	EPA Received Puget Sound FOIA from NWEA
March 2017	EPA Developed Bacteria TMDLs
June 2017	EPA & Ecology Negotiate "Resubmit" Letter
July 2017	EPA Received 2nd Submittal Letter from Ecology
(b) (5)	
August 2017	EPA Received Deschutes NOI from NWEA
(b) (5)	
October 13, 2017	EPA Region 10 Discussion with NWEA, re: NOI

V. KEY ISSUES

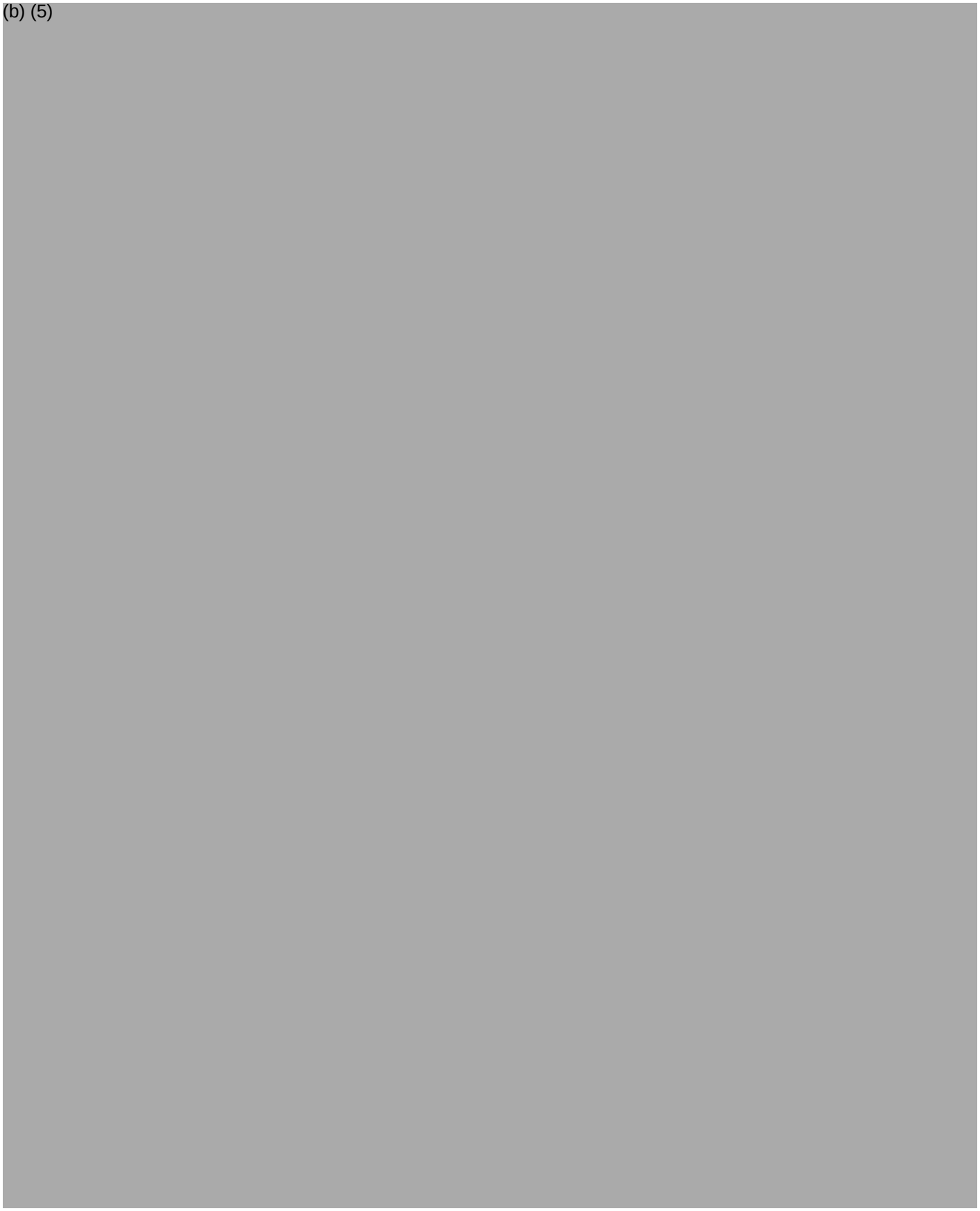
(b) (5)

- NWEA submitted a mandatory duty NOI on August 23, 2017.
- A conversation with NWEA on October 13, 2017, indicates the July 2017 resubmittal letter will not deter litigation.

(b)

VI. ADDITIONAL POLICY AND LEGAL INFORMATION

Section 303(d)(2) of the CWA requires EPA to "either approve or disapprove [a TMDL] not later than thirty days after the date of submission." If EPA disapproves a TMDL, Section 303(d)(2) requires EPA to issue a substitute TMDL within 30 days of disapproval. (b) (5)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IX. NEXT STEPS / UPCOMING DEADLINES

NWEA has not yet filed its complaint, so there are no pending litigation-related deadlines. (b) (5) [redacted]

(b)(5)

APPENDIX A - Summary of TMDL Issues and Viewpoints

Pollutant	Issue	WU Viewpoint	Ecology Feedback*
Dissolved Oxygen **11 segments**	1. Use of NCC as one-way ratchet. Ecology's WQSs allow this interpretation, but it's contrary to the Oregon temperature WQS decision and differs from current Washington TMDLs currently under development. 2. Numeric WLAs absent from one or more regulated point source categories[40 C.F.R. §130.2(h), 40 C.F.R. §130.2(i)] 3. Load capacity is not quantified for one or more streams(40 C.F.R. §130.2(f) 4. Linkage analysis is absent for one or more streams 5. Downstream uses or impairments not considered in load capacity determination (**#1 NWEA Issue**). CWA 303(d)(1)(C)) and 40 C.F.R 130.7(c)(1) require that TMDLs be established at a level necessary to "implement"/"attain and maintain" the "applicable" WQS. WQS in downstream impaired segments are arguably "applicable" WQS for purposes of these provisions. Although there is no caselaw yet on this point, this interpretation is consistent with 40 CFR 131.10(b) which directs states to consider the standards of downstream waters and ensure that standards provide for the attainment and maintenance of downstream waters. Washington state standards have similar language at WAC 173-201A-260 (3)(b). In choosing surrogate measures for DO, Ecology did not consider the nutrient-related impairments in Capitol Lake and Budd Inlet. In other Washington TMDLs, however, Ecology *has* considered downstream standards and has determined LCs based on more stringent downstream standards. This interpretation is also consistent with the Supreme Court's decision in *Arkansas v. Oklahoma*, upholding EPA's permitting requirement at 122.4(d) that WQBELs be stringent enough to protect downstream WQS ("all affected States"). 6. Questionable reasonable assurance due to absence of numeric WLAs and feasibility of establishing buffers in urban area **(#2 Issue for SIT Tribe)** 7. Riparian shade as a surrogate for pollutant is not well justified	[A.] Substantive work (or rework) is needed to successfully complete TMDLs for waters impaired by this pollutant.	{a.} EPA should approve TMDL as WQS were correctly interpreted and implemented at the time of TMDL development. Some Ecology staff may not fully agree with or understand issues: 2,5,7

Temperature **31 segments**	See issues number(s) listed above: 1,2,3,4,6	See [A.]	See {a.} above.
pH **3 segments**	See issue number(s) listed above: 2,3,4,6,7	See [A.]	See {a.} above. Some Ecology staff may not fully agree with or understand issues: 2,5,7
Bacteria **27 segments**	See issue numbers(s) listed above: 5* 8. TMDL components not expressed on 'daily' load basis as required by DC Circuit's *Friends of the Earth* case.	[B.] TMDL could be approved with minor additional work by EPA or Ecology	Ecology understands rationale but does not see environmental benefit.
Fine Sediment **1 segment**	9. TMDL WLA is equal to 0 kg/day 10. Relationship between WLA surrogate (turbidity) and TMDL WLA is not established	[C.] TMDL could be approved but implications of stringent allocations should be understood. Squaxin Island Tribe played significant role in technical work, and supports the sediment TMDL.	Ecology sees WLA=0 as a 'very close to zero' value and a by-product of two disconnected studies. Ecology feels that BMPs and limits implemented in stormwater permits will achieve WQS.

*Protection of downstream standards is also an issue for bacteria as both Capitol Lake and Budd Inlet have been placed in Category 5 for bacteria. Protection of downstream bacteria standards is somewhat less problematic compared to dissolved oxygen as Ecology quantified a load capacity for bacteria. Nutrient load capacities to protect impaired uses downstream are absent in the 2015 TMDL.

APPENDIX A - NWEA Concerns

Ecology scheduled a meeting with Nina Bell on August 2, 2016 at the OR Ops office in Portland, OR to obtain NWEA feedback on the Deschutes TMDL as she had indicated unspecified concerns with the TMDL in previous discussions. Laurie Mann and Chris Zell participated in the meeting at the request of Ecology. Overall, Nina expressed an unfavorable opinion of the TMDL and said the TMDL will not change or improve existing conditions. During settlement discussions for the Washington Water Quality Standards litigation, Nina stated that if Ecology included detailed buffer requirements (e.g. buffer width) as part of the load allocations, she would agree to exclude temperature segments of the Deschutes from the NCC remand that was under discussion at the time. Nina said the DO segments (and maybe pH by reference) of the TMDL were too problematic/flawed and should not move forward.

NWEA	Ecology	EPA
(1) Unconvinced that TMDL will change existing water quality conditions. (2) Downstream waters not protected (self-stated). Failing to protect DS waters is a big deal. TMDL is kind of a shell because it does not deal with DS waters or tributaries. (3) Buffers show up in implementation rather than allocation section. (4) Need to convert shade values into real, implementable surrogates. How was 75 ft. buffer determined? Vertical and areal density is important. What is mature vegetation? (5) The entire TMDL seems to be a surrogate. Suite of shade surrogates may be needed. Why was channel width not allocated as it was part of NCC demonstration. (6) Compliance with permit seems to be compliance with TMDL as WLAs are mostly existing permit conditions or restated WQS. WLAs do not seem to add value. (7) Using shade as surrogate for parameters other than temperature creates holes. (8) TMDL does not assess if current landuse practices, such as forestry, contribute to sediment impairments. (9) Reasonable Assurance section is inconsistent. Should consider actions that are not already occurring. Deferring to Fish and Forest assurances is a problem. (10) TMDL cites nutrient hotspots and impacts but does not limit nutrients. TMDL advocates a 'we'll evaluate later' approach to septics and other nutrient sources. (11) Better to wait until Budd Inlet and Capital Lake TMDL are complete. Maybe move forward with temperature segments only. (12) Lack of NCC is not an excuse to do nothing. Use the data we have and	(1) An approved TMDL may help in retiring water rights and obtaining grant funds. An approved TMDL may help bring government partners to the table such as Thurston County and get conservation districts to work together. (2) Acknowledged the TMDL has some deficiencies and is working with EPA on some issues. Benefits of TMDL are relatively minor. (3) TMDL was split because of the contentious nature of Capital Lake and Budd Inlet. Data would become outdated if Ecology waited to do all waters at once. Evidence is pointing primarily to shade and buffers for the Deschutes. (4) Any buffers that Ecology pays for would have to meet NMFS buffer rule (100 ft rather than 75 ft.).	We primarily listened and took notes. Chris asked Nina to elaborate on Columbia dioxin TMDL and checkpoint approach.

move forward. No good reason for putting things off. The TMDL should have addressed nutrients even if data were not perfect. (13) TMDL does not justify in-stream sediment fines target. How does in-stream fine targets align with WQS? (14) Ecology is hesitant to address Capitol Lake because of benefits as sediment trap, better than a muddy estuary, expensive infrastructure changes (Lake outlet works, MS4, LOTT facility). (15) Checkpoint approach used in Columbia dioxin TMDL is an appealing large watershed approach. (16) Ecology should not get credit for a TMDL when the allocations do not resolve the DO and nutrient issue. (17) Margin of safety and antidegradation section is confusing (18) Would be willing to consider temperature carve out of NCC remand. TMDLs for DO, pH should not move forward until Budd Inlet is completed. Opinion on sediment was limited.		